

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MARCEL G. MCKNIGHT,

*Petitioner,*

2:12-cv-02138-RCJ-CWH

vs.

ORDER

NEVADA BOARD OF PAROLE  
COMMISSIONERS, *et al.*,

*Respondents.*

This habeas matter under 28 U.S.C. § 2254 comes before the Court on its *sua sponte* inquiry into whether the petition is subject to dismissal because none of the claims in the petition have been fairly presented to the state courts and exhausted. This order follows upon a prior show-cause order (#4) and petitioner's response (#5) thereto. Petitioner in addition has filed a number of motions (## 6-8) that are denied by this order.

***Background***

According to the papers presented and the online records of the state courts, petitioner Marcel G. McKnight was convicted in 1999 in Nevada state court, pursuant to a guilty plea, of attempted sexual assault. In the present federal habeas petition, McKnight in principal part challenges alleged action taken by the Nevada Board of Parole Commissioners in connection with his Nevada state conviction. He has been incarcerated in Georgia during the pendency of these federal proceedings.

McKnight contends that he exhausted the claims in the federal petition in a February 7, 2012, original petition filed in the Supreme Court of Nevada.

1 The Court takes judicial notice of the online docket record of the Supreme Court of  
 2 Nevada in the proceeding referenced in the petition.<sup>1</sup> That record reflects that the state high  
 3 court rejected McKnight's February 7, 2012, petition on the following grounds, in full:

4 This is a proper person petition for a writ of habeas corpus.  
 5 Petitioner challenges the revocation of his parole. We have  
 6 reviewed the documents submitted in this matter, and without  
 7 deciding the merits of any claims raised therein, we decline to  
 8 exercise original jurisdiction in this matter. As petitioner's claims  
 9 appear to require discovery and further development, they are  
 10 more appropriately raised in a petition for a writ of habeas corpus  
 11 filed in the district court in the first instance. See NRS 34.360;  
 12 NRS 34.575 (recognizing the right to appeal from a decision of  
 13 the district court denying a petition for a writ of habeas corpus).  
 14 Accordingly, we

15 ORDER the petition DENIED.

16 *McKnight v. Nevada Board of Parole Commissioners*, No. 60186 (Nev., Feb. 27, 2012).

17 Petitioner does not rely upon any other state proceeding in contending that he has  
 18 exhausted the claims in the federal petition.

#### 19 **Exhaustion**

20 The Court may raise issues of exhaustion *sua sponte*. See, e.g., *Aiken v. Spalding*,  
 21 841 F.2d 881, 883 (9<sup>th</sup> Cir. 1988).

22 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court  
 23 remedies on a claim before presenting that claim to the federal courts. To satisfy this  
 24 exhaustion requirement, the claim must have been fairly presented to the state courts  
 25 completely through to the highest court available, in this case the Supreme Court of Nevada.  
 26 E.g., *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup> Cir. 2003)(*en banc*); *Vang v. Nevada*, 329  
 27 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2003). In the state courts, the petitioner must refer to the specific  
 28 federal constitutional guarantee and must also state the facts that entitle the petitioner to relief  
 on the federal constitutional claim. E.g., *Shumway v. Payne*, 223 F.3d 983, 987 (9<sup>th</sup> Cir.

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<sup>1</sup>The Court may take judicial notice of undisputed matters of public record, including documents on  
 file in federal or state courts. E.g., *Harris v. County of Orange*, 682 F.3d 1126, 1131-32 (9<sup>th</sup> Cir. 2012). The  
 online docket records of the state supreme court may be accessed from:

<http://www.nevadajudiciary.us/index.php/supremecourt>

2000). That is, fair presentation requires that the petitioner present the state courts with both the operative facts and the federal legal theory upon which his claim is based. *E.g., Castillo v. McFadden*, 399 F.3d 993, 999 (9<sup>th</sup> Cir. 2005). The exhaustion requirement insures that the state courts, as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged violations of federal constitutional guarantees. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731(1991).

A petition that is completely unexhausted is subject to immediate dismissal. *See, e.g., Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006); *Jiminez v. Rice*, 276 F.3d 478, 481 (9<sup>th</sup> Cir.2001).

It further is long-established law that a claim is not fairly presented and is not exhausted when a petitioner fails to present the claim in a state district court under available state post-conviction procedures and instead presents the claim in an original petition to the state's high court seeking to invoke an extraordinary discretionary jurisdiction. *See, e.g., Pitchess v. Davis*, 421 U.S. 482, 488 (1975); *Ex parte Hawk*, 321 U.S. 114, 116 (1944); *Sweet v. Cupp*, 640 F.2d 233, 238 (9<sup>th</sup> Cir. 1981). *Accord Lindquist v. Gardner*, 770 F.2d 876 (9<sup>th</sup> Cir. 1985). *See also Castille v. Peoples*, 489 U.S. 346, 351(1989)(presenting a claim in a procedural context in which the merits of the claim will not be considered, or will be considered only in special circumstances, does not constitute fair presentation of the claim); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9<sup>th</sup> Cir. 1994)(applying rule to filing of original writ in state high court).

In the present case, petitioner has not fairly presented any claims to the Supreme Court of Nevada in a procedural context in which the merits would be considered absent special circumstances. The state supreme court expressly both declined to exercise its original jurisdiction over the extraordinary petition filed there and stated that it had not decided the merits of any claim in that petition. The petition therefore did not exhaust any claims.

Petitioner nonetheless relies upon the state constitution and the holding in *Blair v. Crawford*, 275 F.3d 1156 (9<sup>th</sup> Cir. 2002), that such an original petition in the state supreme court is "properly filed." However, *Blair* held only that an original habeas petition filed in the

1 Supreme Court of Nevada constitutes a “properly filed” petition for purposes of tolling of the  
 2 federal limitation period under 28 U.S.C. § 2244(d)(2). The question of whether a petition was  
 3 “properly filed” for purposes of tolling the limitation period is a distinct and different question,  
 4 however, from the question of whether the petition also fairly presented claims to the state  
 5 courts for purposes of exhaustion. *Blair* did not hold that the original petition exhausted the  
 6 claims.

7 In the present case, again, the Supreme Court of Nevada quite clearly and expressly  
 8 declined to exercise its original jurisdiction, stated that it did not consider the merits of the  
 9 petitioner’s claims, and stated that the procedure for petitioner to follow was to file a post-  
 10 conviction petition in the state district court. The state supreme court is the final arbiter of  
 11 Nevada state law, including application of the state constitution. The court’s ruling as to the  
 12 proper procedural avenue to pursue in Nevada state court is the final word on that subject.

13 Petitioner’s suggestion that there is “no available administrative-remedial structure” to  
 14 hear his claims is directly belied by the state supreme court’s holding outlining the specific  
 15 procedural avenue that petitioner must pursue to fairly present his claims. A remedial  
 16 structure is available, including through to an appeal to the Supreme Court of Nevada if  
 17 necessary following a decision by the state district court. Petitioner simply has declined to  
 18 follow the available procedure clearly outlined by the state supreme court.

19 Petitioner further relies upon *Fay v. Noia*, 372 U.S. 391 (1963), and *Frisbie v. Collins*,  
 20 342 U.S. 519 (1952), for the proposition that a habeas petitioner need not exhaust state  
 21 remedies where there are exceptional, special, or peculiar circumstances which justify  
 22 departure from rules designated to regulate the usual case. These fifty and sixty year old  
 23 Supreme Court decisions do not state a generally applicable standard for application of the  
 24 exhaustion requirement that takes into account the over half century of intervening statutory  
 25 and jurisprudential developments further specifying the particular governing criteria.<sup>2</sup> In all

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26  
 27 <sup>2</sup>*Fay* at least states no broad overarching rule that a habeas petitioner need not exhaust state  
 28 remedies where there are exceptional, special, or peculiar circumstances which justify departure from rules  
 (continued...)

1 events, petitioner has not presented any exceptional, special, or peculiar circumstances that  
 2 would justify a departure from the generally-applicable rules. Petitioner employed the wrong  
 3 procedure; the state supreme court outlined the proper procedure to follow; and petitioner  
 4 nonetheless has declined to follow the proper procedure. Those are neither exceptional,  
 5 special, or peculiar circumstances. They simply are circumstances in which petitioner has  
 6 failed, through his own intentional choice, to fairly present his claims to the state courts  
 7 through available procedures.

8 The completely unexhausted petition therefore will be dismissed without prejudice.<sup>3</sup>

### 9 ***Pending Motions***

10 On the motion for appointment of counsel, the Court does not find that the interests of  
 11 justice require the appointment of counsel prior to consideration of the exhaustion issue and  
 12 dismissal of the wholly-unexhausted petition without prejudice. A constitutional right to  
 13 counsel does not apply in federal habeas corpus actions. *See Knaubert v. Goldsmith*, 791  
 14 F.2d 722, 728 (9th Cir. 1986). However, 18 U.S.C. § 3006A(a)(2)(B) authorizes a district  
 15 court to appoint counsel to represent a financially eligible habeas petitioner whenever "the  
 16 court determines that the interests of justice so require." The decision lies within the  
 17 discretion of the court; and, absent an order for an evidentiary hearing, appointment is  
 18 mandatory only when the circumstances of a particular case indicate that appointed counsel  
 19 is necessary to prevent a due process violation. *See, e.g., Chaney v. Lewis*, 801 F.2d 1191,  
 20 1196 (9th Cir.1986); *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir.1965).

21  
 22 <sup>2</sup>(...continued)

23 designated to regulate the usual case. Moreover, much of what *Fay* held or stated regarding the relationship  
 24 between state proceedings and federal habeas review further has been overruled by later Supreme Court  
 25 decisions closer in time to the current century. *Cf. Coleman v. Thompson*, 501 U.S. 722, 724 (1991)("The  
 26 *Fay* standard [regarding procedural default] was based on a conception of federal/state relations that  
 undervalued the important interest in finality served by state procedural rules and the significant harm to the  
 States that results from the failure of federal courts to respect them."); *Wainwright v. Sykes*, 433 U.S. 72  
 (1977)(rejecting *Fay*'s approach to procedural-default rule).

27 <sup>3</sup>The Court notes that petitioner's show-cause response is not signed. Given that the arguments  
 28 presented therein are clearly without merit, delay of entry of final judgment to afford petitioner to correct the  
 technical deficiency would be a waste of limited judicial resources. The Court has disregarded the deficiency  
 herein in considering the exhaustion issue.

1 In the present case, petitioner suggests – without any support – that he has “significant  
 2 (verifiable) mental health related handicaps” that impair his ability to proceed *pro se*. His  
 3 extensive multiple filings herein as well as in the state supreme court belie his suggestion that  
 4 any such unspecified mental health handicaps substantially interfere with his ability to seek  
 5 judicial relief. Petitioner further maintains that he does not have access to Nevada legal  
 6 library resources while currently incarcerated in Georgia. Petitioner has not needed Nevada  
 7 state legal materials to litigate the exhaustion issue, and, even as to that issue, he has cited  
 8 to the Nevada state constitution allegedly without access to Nevada legal materials. To any  
 9 extent, *arguendo*, that he would need Nevada state legal materials to pursue federal  
 10 constitutional claims in the state proceedings, he can present his request for same to those  
 11 courts. He has needed neither such materials nor counsel to respond to the show-cause  
 12 order. Petitioner’s lay status otherwise does not mandate the appointment of counsel.

13 The motion for appointment of counsel therefore will be denied.

14 Petitioner’s motions additionally for emergency injunctive relief, for enjoinder of  
 15 extradition, and for provision of legal materials also will be denied. Petitioner must exhaust  
 16 the state judicial remedies outlined in the state supreme court’s order before he may seek  
 17 federal judicial relief.

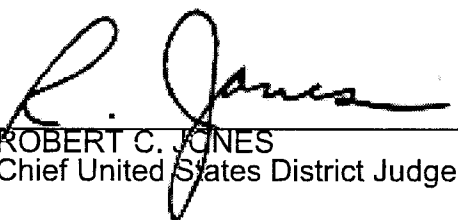
18 IT THEREFORE IS ORDERED that the petition shall be DISMISSED without prejudice  
 19 as completely unexhausted and that all pending motions (## 6-8) are DENIED.

20 IT FURTHER IS ORDERED that a certificate of appealability is DENIED.

21 IT FURTHER IS ORDERED that the Clerk of Court shall effect informal electronic  
 22 service on the state attorney general in the customary manner. **No response is required**  
 23 **from respondents other than to respond to the orders of any reviewing court.**

24 The Clerk shall enter final judgment dismissing this action without prejudice.

25 DATED: May 17, 2013

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 ROBERT C. JONES  
 Chief United States District Judge